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Supreme Court, U.S.
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No. 96-70

In The

Supreme Court of the United States

October Term, 1996

COLUMBIA MACHINE, INC.,

Petitioner,

vs.

HERMAN E. SCHNIDRIG,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Page

Procedural Background 1

Argument 1

Appendix A. Affidavit of Ronald G. Goerss .....App. 1

PETITIONER'S REPLY BRIEF

Procedural Background

Columbia Machine, Inc. ("Columbia") filed its original Petition for Writ of Certiorari on July 10, 1996, requesting review of a judgment and opinion of the United States Court of Appeals for the Ninth Circuit concerning the standard for summary judgment in an employment discrimination case as it relates to "stray remarks." Respondent, Herman E. Schnidrig ("Schnidrig"), timely filed a brief in opposition to Columbia's petition for writ of certiorari. Columbia now respectfully requests that this Honorable Court consider the following reply to Schnidrig's brief in opposition.

Argument

In Schnidrig's opposition, he argues that the Ninth Circuit Court of Appeals properly reversed the granting of summary judgment by relying upon numerous stray remarks creating an inference that age played a role in the decision-making process. Schnidrig asserts the stray remarks themselves raised the inference that the decision-making process may have been tainted and that an issue of fact exists regarding their connection to the decision maker, the executive search firm of Smith, Goerss and Ferneborg. On this basis, Schnidrig disputes that the Ninth Circuit never reached the question of the relationship between the remarks and the decision-making process. Schnidrig makes this argument despite the fact that the Ninth Circuit specifically indicated that it was "premature" to resolve the issue. Appendix A to Petition for Writ of Certiorari, A-12.

As support for this theory and Schnidrig's interpretation of the Ninth Circuit opinion, Schnidrig argues the stray remarks permit an inference that he was denied the position even before the executive search firm was retained and that "but for" the discriminatory intent of the Board of Directors the executive search firm would not have been hired. The fallacy of Schnidrig's argument is simple: in order to withstand summary judgment a plaintiff must present evidence, not conclusions and assumptions, that create a genuine issue of material fact. Schnidrig's belief that the discriminatory intent of the Board of Directors resulted in the hiring of the executive search firm is pure speculation and conjecture. In fact, at no time prior to the filing of the opposition brief has Schnidrig argued or submitted any evidence showing that there would have been no need for an executive search firm had the Board of Directors not harbored discriminatory motives.

Despite the conclusory assertions of Schnidrig, there is no question that he has failed to refute the undisputed evidence offered by Columbia concerning the executive search firm's role in the hiring of a new President. The affidavit of Mr. Ronald G. Goerss, an individual who played a significant part in the process of locating qualified individuals for the position, states that he would not have accepted the assignment from Columbia if age had been one of the qualifying factors for the position. Furthermore, and contrary to the contentions of Schnidrig, Goerss states that he was instructed by the Board to give consideration to any qualified employees of Columbia for the position, including Schnidrig. Indeed, Schnidrig was not only considered for the position but was interviewed

along with three other Columbia employees. It is uncontroverted that Schnidrig was not selected as a qualified candidate because he did not meet the minimum qualifications for the position. See Affidavit of Ronald G. Goerss, attached hereto as Appendix A, that was submitted to the District Court in support of Petitioner's Motion for Summary Judgment (Record at 56-59). Moreover, Mr. Goerss's uncontradicted affidavit demonstrates that any alleged remarks by members of the Board were not considered by his firm in selecting the candidates for the position.

Schnidrig offers no evidence that any of the alleged discriminatory remarks played any part in the executive search firm's decision to eliminate Schnidrig from the list of qualified candidates. To the contrary, there is no evidence or inference that anyone on the Columbia Board had anything to do with the decision-making process that Schnidrig complains of. The Ninth Circuit's failure to reach this crucial element of Schnidrig's claim because of the possible existence of remarks by individuals who played no role in the selection of the qualified candidates is a departure from standards applied in other United

States Circuit Courts of Appeals and demonstrates the need for the granting of a writ.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

HERMAN E. SCHNIDRIG, Plaintiff, vs. COLUMBIA MACHINE, INC., A Washington Corporation, Defendant.	Civil No. CV 92-1304 MA AFFIDAVIT OF RONALD G. GOERSS IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

STATE OF CALIFORNIA)
: ss.
County of San Francisco)

RONALD G. GOERSS, states on oath:

1. I am over the age of eighteen and competent to testify in this action. This affidavit is based upon my personal knowledge of the matters herein.

2. I am a principal of Smith, Goerss & Ferneborg, 388 Market Street, Suite 860, San Francisco, California, an executive search consulting firm. During March 1992, the Board of Directors of Defendant, Columbia Machine, Inc.

("Columbia"), hired our firm to search for qualified candidates for a new President and Chief Executive Officer ("President") for Columbia. We agreed to provide a list of the most qualified candidates to the Board for final decision.

3. Columbia's Board provided me with the minimum qualifications for the President position. Attached to this affidavit as Exhibit "A" is a copy of the document sent to me by Columbia which lists the minimum qualifications for the President position. No Board member, officer, employee or person associated with Columbia ever communicated or inferred in any way that the age of the candidates was a qualification or factor for consideration in selecting the new President. We would not have accepted this assignment if age had been a consideration.

4. We solicited applications for the Columbia President position nationwide. However, I was instructed to give due consideration to any qualified employees of Columbia for the position. At the Board's request, I interviewed three Columbia employees, including Plaintiff. Columbia provided me with a copy of a memorandum from Plaintiff to Fred Neth, Chairman of Columbia's Board, outlining Plaintiff's qualifications for the President position. Attached to this affidavit as Exhibit "B" is a copy of the memorandum.

5. Upon completion of our search, we gave Columbia's Board the identity and summary of the qualifications of five candidates who were the most qualified for the President position. All five of the finalists met or exceeded the minimum qualifications set by Columbia's Board. The Board interviewed two of the most qualified

candidates and offered the position to Gerry B. O'Meara, who accepted and is currently Columbia's President. A copy of our summary of Mr. O'Meara's qualifications is attached to this affidavit as Exhibit "C".

6. We did not select Plaintiff as one of the most qualified candidates for Columbia's President position because he did not meet the minimum qualifications for the position. Plaintiff lacked the minimum of five years of general management experience with a manufacturing company and did not appear to have as thorough a working knowledge of accounting and financial reporting as the candidate selected.

7. In my opinion Mr. O'Meara is highly qualified to be Columbia's President and is a significantly superior candidate when compared to Plaintiff. Mr. O'Meara has been a Division President of a large corporation and has over ten years of general management experience. Also, Mr. O'Meara has a strong manufacturing operations background and a good working knowledge of accounting and financial reporting.

8. I never considered the age of any of the candidates in making my recommendations to Columbia for the President position.

/s/ Ronald G. Goerss
RONALD G. GOERSS

SUBSCRIBED AND SWORN to before me on March ___, 1993.

(SEAL) OFFICIAL SEAL
FATIMA C. BRAZIL
NOTARY PUBLIC –
CALIFORNIA
SANTA CLARA COUNTY
My Comm. Expires
Nov. 1, 1993

/s/ Fatima C. Brazil
NOTARY PUBLIC
FOR CALIFORNIA
My Commission
Expires: 1-1-93